

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,099



EDMUND L. JACKSON,

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Whether, in a grand larceny prosecution, the trial court should have granted appellant's motions for acquittal because the entirely circumstantial evidence against him failed to establish his participation in the crime?

2. In the alternative, whether the judgment must be reversed because the trial court's instructions on aiding and abetting (a) should not have been given at all because the theory was not supportable on the evidence; or (b) as given failed to inform the jury that in order to convict under aiding and abetting it must find that appellant had actively participated in a common criminal plan and not merely acquiesced or been connected with the crime in some other manner?

3. Whether the judgment must be reversed because of the separate or cumulative prejudicial effect of (a) a portion of the Court's instructions which implied that appellant's possession of stolen property had been established; (b) various prejudicial remarks and mischaracterizations of the testimony by the prosecuting attorney; (c) the admission of testimony that appellant had previously visited the shop from which the property involved was taken; and (d) the admission, without a cautionary instruction that it could not be used against appellant, of oral testimony concerning an alleged confession of a codefendant obtained in violation of the Mallory rule?

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18, 099

EDMOND L. JACKSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of Title 22, Section 2201 of the District of Columbia Code (Grand Larceny). Appellant was indicted on May 20, 1963. On his plea of not guilty, he was tried before a judge and jury in the District Court. Judgment and sentence were entered on July 22, 1963. On July 31, 1963 Appellant petitioned the District Court for leave to appeal in forma pauperis. The petition was granted on August 14, 1963.

Jurisdiction of this Court to review the judgment below rests on 28 U.S.C. §1291.

STATEMENT OF THE CASE

Appellant, Edmond L. Jackson, with two others, was indicted for house breaking and grand larceny based on the theft of three wigs from the display window of the Wig Shoppe, 1762 Columbia Road, N.W. during the early morning of April 29, 1963.(Indictment; Tr. 33, 35-36).

All three defendants, Appellant, Robert H. Dykes and George T. Lollar, entered pleas of not guilty and were tried together before Judge McLaughlin and a jury in July, 1963. On July 10, 1963, the jury found Dykes guilty on both counts but found Lollar and Appellant guilty only of grand larceny. (Tr. 354). On July 22, 1963, judgment of conviction was entered and Appellant was sentenced to confinement for a period of six to eighteen months. (Judgment of Conviction and Sentence, filed July 22, 1963).

1. The Events of April 29, 1963

Shortly after midnight, on the morning of April 29, 1963, the display window of the Wig Shoppe, 1762 Columbia Road, N.W., Washington, D.C., was broken and three wigs on display there were taken. Two of these wigs were second-hand, belonging to the wives of two of the partners operating the Wig Shoppe. (Tr. 35-38).

The breaking of the window was observed by two eye witnesses.

Miss Patricia B. Flemming, a taxicab telephone operator, who was standing in a second-floor bay window at 1756 Columbia Road, next door to the Wig Shoppe, testified that she first observed a man (whom she later identified as the defendant Lollar) passing her office walking toward the Wig Shoppe. Almost immediately, she heard a sound of breaking glass and then observed another man (whom she later identified as the defendant Dykes) backing out of the Wig Shoppe window. Both men then ran west on Columbia toward Champlain Street.(Tr. 192-195). Miss Flemming further testified that the street was well lighted, that she had a good view of the whole block from 18th Street on the west to Ontario Road on the east, that she had been at the window for "three or four minutes" but saw only two men near the Wig Shoppe, that if a "congregation" of men had been present in front of the Wig Shoppe, she would have seen them, and that she did not see Appellant "at all". (Tr. 210-11, 224-27, 240-42, 249).

The incident was also observed by George G. Madell, a C.I.A. employee, who was walking across the street about a block away (Tr. 86-87, 97). Madell testified that he first observed three men in front of the Wig Shoppe but that the group split up and that one of the men, whom he was never able to identify, walked away and around the

corner on Ontario Road. (Tr. 87, 89, 93, 96). Another man (later identified as Lollar) went "about fifty feet towards Champlain and stopped." (Tr. 87-8, 91-2, 96-7). Madell then saw the remaining man (later identified as the defendant Dykes) break the window. Then Dykes and Lollar ran around the corner on Champlain Street. (Tr. 87-88).

Shortly thereafter, a police cruiser arrived on the scene, manned by officer Brian G. Traynor and another policeman. They picked up Madell and proceeded to the 1600 block of Euclid Street, N.W. (Tr. 109-11). There they observed three men walking east at a normal pace. (Tr. 99, 111, 172). Madell recognized Dykes and the policemen called to the men to stop. (Tr. 99, 111, 183). Although the three men at first kept walking they halted upon the second call by the police and came toward the police car. (Tr. 112, 175-76). Officer Traynor testified that as the three men turned to face the police car, Appellant was "standing behind the fender of a car" and "tugged at the front of his sport coat pulling it away from his body." (Tr. 112-13). After the three men had been searched without result and placed in another cruiser for transportation to No. 10 Precinct, Officer Traynor went behind the parked car and found there a black wig, later identified to be one of the second-hand wigs taken from the Wig Shoppe. (Tr. 113-114, 186, 38). On cross-examination, Traynor confirmed that he never saw Appellant with a wig "at any time." (Tr. 179). The pick-up occurred some 10 to 15 minutes after the breaking. (Tr. 103).

Arrested at 12:35, the three men were taken to No. 10 Precinct, where Dykes was questioned by detectives and Officer Traynor. During the course of this questioning, Dykes was more completely searched, and according to disputed testimony, a blond wig (later identified as from the Wig Shoppe) was taken from his shorts about 1:00 A.M. (Tr. 118, 120-23, 129-35, 147-51, 155-58, 262-63).

After ten minutes more questioning, according to Traynor's oral testimony, Dykes confessed to breaking into the Wig Shoppe and stealing the wigs. (Tr. 151-52). No written record of this "confession" was ever made. (Tr. 160-63).

Later, Officer George O. Young, one of the officers from the cruiser which had transported the three men, found a red wig (also from the Wig Shoppe) on the floor in the back of the cruiser in which the three men had been riding. (Tr. 185-88, 35-39).

2. The Trial Proceedings

At the trial, the prosecution called the eye witnesses Flemming and Madell, who testified substantially as indicated above. The prosecution also called Robert Shrier, one of the owners of the Wig Shoppe, Officer Traynor and Officer Young.

Over the objection of Jackson's counsel, Shrier was permitted to testify that "a few days" prior to April 29, 1963, Jackson had come into the Wig Shoppe, inquired about the prices and texture of the wigs

and asked to see some, indicating he was interested in purchasing one for a dancing act. (Tr. 20-23, 31-32, 39-40).

Officer Traynor, in addition to describing the arrest as outlined above, was also permitted to testify, over the objection of Dykes' counsel, that Dykes had stated, in response to questioning at 1:10 A.M. (some 35 minutes after Dykes' arrest but prior to arraignment) (Tr. 120) "Yeah, I am the one who broke into the Wig Shoppe. I broke in and took the wigs." (Tr. 151). Officer Traynor's speaking voice made it difficult for defendants' counsel to hear his answers. When the Court requested the witness to speak more clearly and loudly, the prosecuting attorney repeated the alleged oral confession and subsequently encouraged Traynor to "repeat it very loudly," which he did. (Tr. 151-52). The Court not only overruled Dykes' Mallory objection (Tr. 134-35, 151), but failed at any time to caution the jury that the "confession", which had been repeated to them three times, could not be considered against Appellant and Lollar.

At the close of the government's evidence, Appellant and his co-defendants all made motions for acquittal which were denied. (Tr. 250-53).

Thereupon the defendant Dykes took the stand and denied any participation in the crime. He stated that he first met Appellant and Lollar on Euclid Street, where the latter two were assisting Dykes to

find a cab. (Tr. 259-60). Defendant Lollar presented two alibi witnesses but did not take the stand. Appellant presented no witnesses and did not testify on his own behalf.

All motions for acquittal were renewed at the close of the evidence and again denied. (Tr. 275).

The prosecuting attorney devoted her closing and rebuttal arguments almost exclusively to a review of the evidence against Appellant. Inaccurately referring to Shrier's testimony, she told the jury that when Jackson visited the Wig Shoppe, "he evidence a desire to have a wig and to look over the premises." (Tr. 285, emphasis supplied). She also stated, contrary to fact, that Madell had testified that the "third man" he thought he saw was "about the same size and shape of Jackson" and "was wearing a dark jacket and dark pants" and that Officer Traynor had testified that Jackson was wearing "a dark jacket and dark pants" when arrested. (Tr. 287). Next, she stated that Officer Traynor had testified that Jackson, when stopped by the police, "went behind the fender of a car and shook his jacket." (Tr. 287, emphasis supplied).

Finally, in her closing argument, she told the jury that as prosecutor she did not "sit at the counsel table alone. These empty seats you see there are seats of our clients. My client is the District of Columbia, my client is everybody--." (Tr. 323) Despite the objections of Appellant's counsel, the Court refused to interfere with this line of

argument and the prosecutor concluded, "Mr. Klein said I have behind me the might and majesty of the government and that is true. I am very proud of it." (Tr. 323-24).

The prosecuting attorney also indicated in her closing argument that the judge would instruct "that if you have all of these people working together in a common enterprise, it doesn't matter whose wig is worth what. It is the whole picture together, if you find this was a joint endeavor." (Tr. 321-22). The Court gave no such instruction.

Over the objection of Jackson's counsel, who stated that aiding and abetting was not "in this case" (Tr. 280), the judge instructed the jury as follows:

"In this connection you are instructed that it is not necessary that a person be physically present and physically participate in the commission of an offense in order to be guilty of an offense as a principal.

"You are instructed that it is the law in the District of Columbia that in prosecutions for any criminal offense, all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offenders, shall be charged as principals and not as accessories. The authority for that is Title 22, District of Columbia Code, Section 105.

"To aid and abet is meant to assent to an act, to lend to it countenance and approval, either by an active participation in it or by in some manner advising, inducing, or encouraging it.

"In this case if you find that the government has shown beyond a reasonable doubt that the offenses charged in the indictment or one of them have been

committed, and that it has also been shown beyond a reasonable doubt that any of the defendants, even though not physically participating in it, aided and abetted in the commission of said offense, this will be sufficient to justify you in finding said defendant guilty of the said offense.

"Therefore, where one or two defendants are found guilty as principal offenders, and the other as having aided and abetted said principal offender or offenders the defendant who aided and abetted is guilty of the same offense as though he were the principal offender.

"Of course, where the jury is not convinced beyond a reasonable doubt that the offenses charged in the indictment were in fact committed, or it is not convinced beyond a reasonable doubt that the defendant charged as aider and abettor did in fact aid and abet in the commission of the offense charged in the indictment, then the jury must return a verdict of not guilty as to the defendant or defendants charged with aiding and abetting.

"In this connection you, the jury, are to consider all the facts and circumstances in connection with and surrounding the alleged acts of any defendant as elements to be taken into account by you in determining whether or not it has been established beyond a reasonable doubt that any defendant in this case aided or abetted the principal offender in the commission of any alleged offense charged in this case, if you shall have found a principal offender or offenders did commit said alleged offense." (Tr. 334-35).

In the course of his instructions, the Court also stated: "In this case there has been evidence that the defendants were found in possession of property which is allegedly stolen property." (Tr. 331, emphasis added). He then instructed the jury that the unexplained possession of stolen property gave rise to an inference of guilt of grand larceny. (Ibid.)

Despite the objections of Appellant's counsel and counsel for co-defendant Lollar, the court refused to modify his instructions on aiding and abetting in any way or to correct his comment that the "evidence" in the case showed that the defendants had been found in possession of the stolen property. (Tr. 349-52).

On July 10, 1963, the jury acquitted Appellant on the house breaking count, but convicted him of grand larceny in a general verdict which in no way revealed the theory on which it was based. (Tr. 354, Verdict).

Subsequently, on July 16, 1963, Appellant's trial counsel filed a written motion for acquittal, (Motion for Acquittal or New Trial, July 16, 1963), which was denied by the trial Court on July 22, 1963. (Denial of Motion for Acquittal or New Trial, July 22, 1963). This appeal follows.

STATUTES INVOLVED

District of Columbia Code § 22-2201 provides:

"Whoever shall feloniously take and carry away anything of value of the amount or value of \$100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, § 826; Aug. 12, 1937, 50 Stat. 628, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, § 215(a)).

District of Columbia Code § 22-105 provides:

"In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be." (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 908).

STATEMENT OF POINTS

1. The trial court erred in denying Appellant's motions for acquittal at the close of the prosecution's case, at the close of the evidence, and after verdict.
2. The trial court erred in instructing the jury on aiding and abetting without either (a) cautioning that the instruction was not

necessarily applicable to Appellant, or (b) properly outlining the elements of aiding and abetting in light of the facts of this case.

3. The trial court erred in (a) implying in his instructions that Appellant's possession of stolen property had been conclusively established; (b) permitting the prosecuting attorney to engage in mis-characterizations of testimony and other impermissible argument in her closing and rebuttal statements; (c) admitting testimony concerning a previous visit to the Wig Shoppe by Appellant; (d) admitting, without a cautionary instruction that it could not be considered against Appellant, testimony of an alleged oral confession of a co-defendant obtained in violation of the Mallory rule.

SUMMARY OF ARGUMENT

I. The principal issue in this grand larceny case is whether the entirely circumstantial evidence against Appellant was sufficient to permit a jury to find guilt beyond a reasonable doubt without indulging in speculation based on suspicion rather than proof. The evidence is clear that Appellant was not physically present and did not physically participate in the offense charged. One of the Government's own eye-witnesses established that Appellant was not present at the place of the crime. The second eyewitness, who thought he saw a "third man" walk away from the Wig Shoppe and around the corner on Ontario prior to the

crime, was never able to identify Appellant. The only probative evidence against him is his presumed presence with two codefendants on Euclid Street several blocks removed from the scene of the crime and 15 minutes after the occurrence of the crime, coupled with the finding of a black wig beside a parked car near which he was standing. Thus the evidence created at most the type of suspicion which numerous previous cases have held insufficient to justify conviction.

II. Assuming arguendo that the evidence was sufficient to go to the jury, the trial court's abstract charge on aiding and abetting was both insufficiently related to the facts of this case and erroneous as a matter of law. In the absence of facts showing any active participation in a common criminal plan by Appellant, no instruction on aiding and abetting should have been given as to him. Instead the instruction given failed to explain clearly the requirement of active participation in a common plan and emphasized primarily that an accused need not "physically participate" in a crime to be guilty as a principal. Thus, far from providing an appropriate legal yardstick against which to measure Appellant's conduct, the instruction constituted an open invitation to the jury to convict if they found any connection, no matter how slight, between Appellant and the crime.

III. In light of the weak and circumstantial case against Appellant, numerous other errors in the conduct of the trial constitute

prejudicial error since, with respect to any or all of them, it cannot be said with fair assurance "that the judgment was not substantially swayed by the error" Kotteakos v. United States, 328 U.S. 750, 765 (1946). These errors include:

- (a) The trial court's comment on the evidence concerning possession of stolen property;
- (b) The prosecuting attorney's mischaracterizations of testimony and other remarks in her closing argument;
- (c) The admission of irrelevant and inflammatory testimony concerning Appellant's prior visit to the Wig Shoppe;
- (d) The admission, without a cautionary instruction that it could not be used against Appellant, of hearsay testimony concerning an alleged oral confession of a codefendant obtained after 35 minutes of prearraignment questioning.

ARGUMENT

I.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTIONS FOR ACQUITTAL

[With respect to Point I, Appellant desires the Court to read the following pages of the reporter's transcript; Tr. 86-93, 96-99, 102-104, 109-115, 172-179, 181-183, 192-195, 209-214, 218-19, 223-227, 240-42, 249-52, 275. See also Appellant's Motion for Acquittal or New Trial, filed July 16, 1963.]

Under this Court's decision in Cooper v. United States, 218 F.2d 39, 94 U.S. App. D.C. 343 (1954), the trial judge ruling on a motion for acquittal must grant the motion "where a reasonable mind has a reasonable doubt of the accused's guilt" for to do otherwise would permit the jury to "speculate without evidence adequate in law." 218 F.2d at 41, 94 U.S. App. D.C. at 345. And, where the trial judge erroneously permits the jury to convict, this Court will reverse and enter a judgment of acquittal. 218 F.2d at 42, 94 U.S. App. D.C. at 346.

In the case at bar, Appellant made timely motions for acquittal at the close of the prosecution's case (Tr. 250-52), at the close of the evidence (Tr. 275), and after verdict. (Motion for Acquittal or New Trial, July 16, 1963). The trial Court denied them all. Yet, as we shall show (1) the evidence against Appellant, entirely circumstantial

in nature, was insufficient to raise more than faint suspicion that he had participated as a principal in the larceny of wigs; and (2) this same circumstantial evidence was likewise insufficient to permit a conclusion beyond a reasonable doubt that Appellant had aided and abetted in the larceny.

A. The Evidence Against Appellant, Entirely Circumstantial in Nature, Was Insufficient to Raise More Than a Faint Suspicion That He Had Participated As a Principal in the Larceny of the Wigs.

Viewed most favorably to the prosecution, the evidence against Appellant may be summarized as follows:

No one placed him at the scene of the crime. One eyewitness, who was over a block away at the time, testified he saw a man break away from the group of three men standing in front of the Wig Shoppe, walk east, and around the corner on Ontario Road. (Tr. 87-89, 96-97). Although this witness readily identified the other two men as the co-defendants, Dykes and Lollar, he was never able to identify the third man. (Tr. 90-93).

A second government eyewitness, whose vantage point in a second-floor bay window placed her much nearer the scene of the crime (Tr. 193, 218-19), also readily identified Dykes and Lollar (Tr. 194-95), but admitted "I did not see the third boy at all." (Tr. 226-27, 249). As her testimony makes clear, the street was well lighted, she could see from 18th to Ontario, and if a third man had been in the vicinity prior

to the smashing of the window, she would have seen him. (Tr. 194, 210-
212, 240-42, 249).^{1/}

Some 15 minutes after the Wig Shoppe window was broken, a marked police cruiser found Appellant, with Dykes and Lollar, walking east in the 1600 block of Euclid Street, N.W. The three made no attempt to flee, but stopped the second time the police called to them. As Appellant turned to face the police car, he was behind the fender of a parked car. One of the police officers saw him tug at his jacket. After the three men had been searched without result and placed in another squad car for transportation, the officer returned to the parked car and found beside it a black wig, later identified as one of those taken from the Wig Shoppe. (Tr. 38, 103, 111-14, 172-79).^{2/}

In sum, Appellant was not at the scene of the crime when it occurred. According to the prosecution's own eyewitness, Miss Flemming, he was never in the vicinity at all. Even assuming the "third man" was in fact present before the breaking, it is undisputed he walked away and around the corner before any overt act was committed. When apprehended,

1/ In fact, this witness described in some detail the activities of a couple at the corner of Columbia and Ontario--the very corner toward which the "third man" had supposedly walked. (Tr. 210, 224-25).

2/ The prosecution also established that Appellant had visited the Wig Shoppe a few days before the wigs were stolen, inquired about wigs and asked to try one on, which was "discouraged" (Tr. 39-40). As we shall show (pp. 35-36, infra), this testimony was irrelevant to the issues in the case. Its admission was based on the assumption of a state of facts the prosecution was unable to prove and its prejudicial nature was aggravated by the prosecuting attorney's closing remarks. (Tr. 22-23, 285). But even assuming this evidence was properly before the jury, it adds nothing to the case when stripped of its inflammatory and suggestive overtones. At most, it shows a general interest in wigs, certainly not enough to create more than a suspicion in the mind of a reasonable man.

Appellant did not behave in a guilty manner, and no stolen property was ever found in his possession. The only evidence against him is his presence with Dykes and Lollar on Euclid Street coupled with the finding of the black wig beside a parked car.

Thus, the sketchy evidence here is strikingly similar to that in numerous other cases where this Court reversed convictions because to do otherwise would permit the jury to act on "surmise and conjecture, without evidence." Cooper v. United States, 218 F.2d 39, 42, 94 U.S. App. D.C. 343 (1954).

In Cooper itself, a robbery prosecution, the conviction was reversed where "nobody identified him as one of the robbers. Nobody placed him at the scene of the robbery." 218 F.2d at 41, 94 U.S. App. D.C. at 345. Likewise in Scott v. United States, 232 F. 2d 362, 98 U.S. App. D.C. 105 (1956), another robbery prosecution, the conviction was reversed where "Scott did not participate in the actual holdup" and the evidence left a reasonable doubt he had participated as an aider and abettor. 232 F. 2d at 363-64, 98 U.S. App. D.C. at 106-107. And in Davis v. United States, 274 F. 2d 585, 107 U.S. App. D.C. 76 (1960) this Court reversed a conviction for promoting a lottery where "There was no probative evidence that [appellant] was in possession of numbers slips. The entire testimony concerning his activities reveals only that he was repeatedly in the company of gamblers." 274 F. 2d at 588, 107 U. S. App. D.C. at 79. See also Aiken v. United States, 232 F. 2d 66, 68,

98 U.S. App. D.C. 66, 68 (1956) (no inference of possession of lottery slips from their presence in apartment recently occupied by appellant).

To be sure, this Court has upheld a grand larceny conviction based on numerous incriminating circumstances including the "possession of recently stolen property, unexplained." Edwards v. United States, 139 F. 2d 365, 368, 78 U.S. App. D.C. 226, 229 (1944), cert. denied, 321 U.S. 769 (1944).^{3/} But the Court has never implied that this inference arising from possession could overcome eyewitness testimony that a defendant did not participate in the crime.

In this case, the evidence clearly establishes that Appellant did not physically participate in the theft. Moreover, no stolen property was seen in Appellant's possession "at any time" (Tr. 178-79). The presence of the wig beside the parked car created at most a "suspicion" of possession. Thus, the jury was permitted to infer guilt from circumstantial evidence which itself created only a weak inference of possession.^{4/} But where

3/ In Edwards, eyewitness testimony left no doubt that two men (one of whom was positively identified) had actively participated in the crime. The appellant there was found in the company of the identified defendant, actually wearing a suit identified as part of the stolen goods. 139 F. 2d at 368, 78 U.S. App. D.C. at 229. In Tractenberg v. United States, 293 Fed. 476, 53 U.S. App. D.C. 396 (1923) there were no witnesses to the actual taking of an automobile. Defendant indisputably was in possession of the car the next day, and took it to Petersburg, Va. two days later. The defendant had admitted to police he knew the car was stolen.

4/ Indeed, as will be shown infra, pp. 30-32, the Court's instructions encouraged them to so find by overemphasizing the probative value of the testimony concerning "possession."

"the evidence of possession was weak and tenuous" this Court has refused to allow the jury to rest a presumption of illegal activity thereon."
Davis v. United States, 274 F. 2d 585, 587-88, 107 U.S. App. D.C. 76, 79 (1960).^{5/}

Clearly, Appellant's guilt as a principal could only be established by permitting the jury to speculate guilt based on an inference of possession in the face of uncontradicted testimony that Appellant had in no way participated in the actual taking of the wigs. Such speculation, based on suspicion, not proof, cannot support a conviction under our system of jurisprudence. Cooper v. United States, 218 F.2d 39, 42, 94 U.S. App. D.C. 343, 346 (1954).

B. This Same Circumstantial Evidence Likewise Was Insufficient to Permit a Conclusion Beyond a Reasonable Doubt That Appellant Aided and Abetted in the Larceny.

Not only is the evidence insufficient to support Appellant's conviction as a principal, it is likewise insufficient to support conviction on the alternate theory that he "aided and abetted" in the larceny within the meaning of D.C. Code §22-105.

^{5/} See also People v. Foley, 307 N.Y. 490, 121 N.E. 2d 516, 517 (1954); "The circumstances [establishing possession] must be established by clear and convincing evidence and must be of such a character as, if true, to exclude to a moral certainty every other inference but that of recent and exclusive possession by defendants. While the testimony adduced presents many facts that are consistent with and point to recent and exclusive possession by defendants of the stolen articles, there is no one fact or series of facts which points inevitably thereto and it cannot be said that the evidence excludes to a moral certainty every other reasonable hypothesis but that defendants had conscious recent and exclusive possession of the stolen property." Cf. Jackson v. United States, 250 F.2d 772, 773, 102 U.S. App. D.C. 109, 110 (1957); Aikens v. United States, 232 F.2d 66, 68, 98 U.S. App. D.C. 66, 68 (1956).

As that Section recites, its intent is only to apply to "accessories before the fact" in all crimes the law "heretofore applicable in cases of misdemeanor" -- i.e. to make "accessories before the fact" punishable as principals.^{6/}

As the Sixth Circuit's Morei decision construing the analogous Federal statute, 18 U.S.C. §2, establishes:

"A person is not an accessory before the fact unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage the criminal act, or assist or enable it to be done, or engage or counsel or command the principal to do it." Morei v. United States, 127 F.2d 827, 830-31 (6th Cir., 1942).

Other Federal decisions under 18 U.S.C. §2 likewise stress the necessity of active participation in a common criminal plan to support a conviction under the aiding and abetting theory. See Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (defendant must "seek by his action" to make criminal venture succeed); Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952) (aider and abettor must share "criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed"); United States v. Peoni, 100 F. 2d 401, 402 (2d Cir. 1938) (statute contemplates "purposive attitude" and active participation in criminal venture). Cf. Stevens v. United States, 319 F. 2d 733, ___ U.S. App. D.C. ___ (1963) (requiring "guilty knowledge" in unauthorized use cases); Kemp v. United States, 311 F.2d 774, 114 U.S. App. D.C. 88

6/ The D.C. Code retains a separate provision (§22-106) providing lesser punishment for "accessories after the fact."

(1962) (same); Lanham v. United States, 185 F. 2d 435, 436, 87 U.S. App. D.C. 357, 358 (1950) (requiring "reasonable conclusion of guilty participation").

Yet here there was no evidence of a common criminal plan, let alone of "purposive" and active participation in it by Appellant. Appellant was first seen with Dykes and Lollar on Euclid Street, several blocks from the scene of the crime. By this time the offense of larceny was complete and any action by Appellant could not have made him an accessory before the fact unless carried out pursuant to a prearranged plan. Rizzo v. United States, 275 Fed 51 (3rd Cir. 1921).^{7/} But there was no direct evidence of any plan, cf. Scott v. United States, 232 F. 2d 362, 363 n. 1, 98 U.S. App. D.C. 105, 106 n. 1 (1956). And aside from Madell's speculation that the unidentified and possibly non-existent "third man" was acting as a "kind of look out" (Tr. 104) -- which the trial court ordered the jury to disregard -- the record does not even suggest a plausible theory under which the activities of anyone other than Dykes could have been intended to contribute to the success of the venture at the Wig Shoppe.^{8/}

7/ See also Smith v. United States, 306 F.2d 286, 113 U.S. App. D.C. 126 (1962) (defendant who was present at scene of pursesnatching and was "promptly" handed stolen wallet charged only as "accessory after the fact").

8/ Madell's testimony that three men were present in front of the Wig Shoppe was contradicted by the other prosecution eyewitness, Miss Flemming. Even if the "third man" was there, his actions as described by Madell -- walking east on Columbia and around the corner on Ontario -- scarcely create a suspicion of "active participation." Moreover, there is no evidence supporting an inference that the "third man" was Appellant. Madell testified the "third man" was wearing "dark clothes" (Tr. 89, 96). Contrary to the prosecuting attorney's representations to both the judge and the jury (Tr. 22-23, 287), the only witness who ever described the clothing Jackson was wearing when apprehended said only "I believe he was wearing the same jacket as he has on today" (Tr. 182).

The evidence against Appellant was thus much more speculative than that held insufficient to support a conviction in Scott v. United States, 232 F.2d 362, 98 U.S. App. D.C. 106 (1956). There Scott himself was seen with the "clearly guilty" principal, Pell, across the street from the scene of the crime within five minutes prior to a robbery. The prosecution's theory was that he acted as "lookout."^{9/} When arrested, Scott falsely denied knowing Pell, told an implausible story, and was found in possession of gun grips which "'matched pretty good'" Pell's gun. 232 F. 2d at 363, 98 U.S. App. D.C. at 106. Yet, the Court reversed the conviction because the evidence, although sufficient to create "grave suspicion" that Scott aided and abetted Pell nevertheless left "reasonable doubt as to Scott's participation." 232 F. 2d at 364, 98 U.S. App. D.C. at 107.

Pursuant to this recognized principle the trial judge should have directed Appellant's acquittal here and not permitted the jury to speculate as to Appellant's guilt on the basis of inarticulated and unsupported theories of "aiding and abetting."

^{9/} Significantly, the Court noted the abandonment of the belated theory first advanced in the Government's brief on appeal, that Scott had conceived the idea of the crime. "There was in fact no evidence of any advice of any sort from Scott to Pell." 232 F.2d at 363 n. 1, 98 U.S. App. D.C. at 106 n. 1.

II.

IN LIGHT OF THE LACK OF EVIDENCE THAT APPELLANT PARTICIPATED IN ANY WAY IN THE CRIME CHARGED, NO INSTRUCTION ON AIDING AND ABETTING SHOULD HAVE BEEN GIVEN. THE INSTRUCTION GIVEN FAILED TO EMPHASIZE THE NECESSARY ELEMENTS OF AIDING AND ABETTING AS APPLICABLE TO THE FACTS OF THIS CASE, THUS ENCOURAGING THE JURY TO SPECULATE AS TO APPELLANT'S GUILT ON THE BASIS OF UNREVEALED THEORIES.

[With respect to this point, Appellant desires the Court to read, in addition to those pages cited under Point I, the following pages of the reporter's transcript: 31, 279-80, 334-35, 351-52.]

Despite the repeated objections of Appellant's counsel that aiding and abetting was not "in this case" (Tr. 280, 351) the trial judge devoted some 7 paragraphs of his instructions to an abstract charge on aiding and abetting (Tr. 334-35). Thus assuming, arguendo, that the Court did not err in permitting the jury to decide Appellant's guilt on the speculative evidence presented, the judgment must nevertheless be reversed because of errors concerning these aiding and abetting instructions.

It is elementary that "a charge to a jury should be drawn with reference to the particular facts of the case on trial" Colazzo v. United States, 196 F. 2d 573, 578, 90 U.S. App. D.C. 241, 246 (1952), cert. denied 343 U.S. 968 (1952), and not "a supposed or conjectural state of facts, of which no evidence has been offered." United States v. Breitling, 20 How. 252, 254, 15 L.Ed. 900, 902 (1858). Moreover, the defendant

is entitled to a charge which "does not unduly emphasize the theory of the prosecution," Perez v. United States, 297 F. 2d 12, 16 (5th Cir. 1961) and does not mislead the jury on any significant point. Bollenback v. United States, 326 U.S. 607, 612 (1946).

As we shall demonstrate herein, the charge given in this case was not only unnecessary but actually encouraged the jury to convict Appellant on the basis of unarticulated and improper legal theories.

A. No Charge on Aiding and Abetting Should Have Been Given as to Appellant.

As has been shown (supra, pp. 20-23), nothing in the activities of Appellant or of the unidentified and possibly non-existent "third man" establish that degree of active participation in a common plan essential to an aiding and abetting conviction. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); Johnson v. United States, 195 F. 2d 673-75 (8th Cir. 1952); Morei v. United States, 127 F. 2d 827, 830-31 (6th Cir. 1942); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). There was no evidence that Appellant conceived the idea of the theft or that he advised anybody concerning it. Cf. Scott v. United States, 232 F. 2d 362, n. 1, 98 U.S. App. D.C. 105, 106 n. 1 (1956). The prosecution did not even advance a theory as to how any action by Appellant might have been intended to advance the larceny.

Since nothing in the "particular facts of the case on trial" justified a conclusion that Appellant had "aided and abetted" in the crimes charged, the instruction that under D.C. Code §22-105 "all persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offenders" could be convicted as principals (Tr. 334), without a caution that it did not apply to Appellant, was prejudicially misleading. By unduly emphasizing the aiding and abetting theory the Court failed to provide an "appropriate legal yardstick" to measure Appellant's conduct and instead gave the jury a deceptively convenient rationale to convict on the basis of any stray suspicions developed during the course of the trial. Cf. Bollenback v. United States, 326 U.S. 607, 614 (1946).

B. The Charge as Given Was Misleading and Prejudicial in that it Failed to Define the Elements of Aiding and Abetting in Relation to the Particular Facts of the Case.

Even assuming that some charge on aiding and abetting might have been appropriately given with respect to Appellant, the abstract charge actually given provided no guidelines appropriate to the "particular facts of the case on trial."^{10/} Collazo v. United States, 196 F. 2d 573, 578, 90 U.S. App. D.C. 241, 246 (1952). Cf. Bollenback v. United States, 362 U.S. 607, 612-15 (1946).

^{10/} Consistent with his position that aiding and abetting was not "in this case" (Tr. 280), Appellant's trial counsel submitted no written request for a specific instruction on the subject. His timely objection at the close of the charge (Tr. 351) satisfies Fed. R. Crim. Proc. 30. That further efforts to modify the aiding and abetting charge would have been useless is clear from the trial court's immediately subsequent adverse ruling on a request by Lollar's counsel. (Tr. 352).

After informing the jury the D.C. Code §22-105 permitted aiders and abettors to be charged as principals, the Court stated:

"To aid and abet is meant to assent to an act, to lend it countenance and approval, either by an active participation in it, or by in some manner advising, inducing or encouraging it." (Tr. 334)

This statement, the only explanation of the elements of aiding and abetting in the seven paragraph charge on the subject, implied contrary to law that mere "assent" constituted "aiding and abetting." Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952). It overlooked the requirement of "shared criminal intent" (ibid) and left the jury free to speculate as to what constituted "in some manner advising, inducing or encouraging" the substantive crime.

In sum, this attempt to define the elements ignored the traditional established requirements of knowing and active participation in a common criminal plan.^{11/} See cases cited supra, pp. 21-22, 25.

^{11/} Contrast the instruction on aiding and abetting in United States v. Turberville, Cr. No. 14-60, Tr. Vol. 5, pp. 511-12 (D.C. 1960), approved by this Court in Turberville v. United States, 303 F. 2d 411, 413, 112 U.S. App. D.C. 400, 402 (1961) (emphasis supplied):

"Ladies and gentlemen, the law provides that any person advising, inciting or conniving in an offense, or in aiding or abetting the principal offender shall be charged as a principal, that he is as guilty of the offense as though he himself committed it. The words 'aid and abet' comprehend all assistance rendered by acts, words, encouragement, support or presence actually or constructively to render assistance should it become necessary.

You are instructed, however, that the mere presence of a defendant at the scene of a crime in and of itself standing alone is not sufficient in itself to justify a verdict of guilty.

The presence of a defendant at the scene of a crime is a matter that may be considered by you in connection with all the other evidence. In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that is, he must participate in it as in something he wishes to bring about, and

Instead it twice stressed that a person need not "be physically present and physically participate" in the offense to be guilty as a principal (Tr. 334), and informed the jury only that it could consider "all the facts and circumstances" in determining whether a defendant had aided and abetted. (Tr. 335).

The crucial importance of the aiding and abetting charge is manifest. Appellant was not "physically present" and did not "physically participate" in the offenses charged. Thus it is highly likely that the jury convicted on the aiding and abetting theory.^{12/} Even assuming that the evidence against Appellant might have justified such a conclusion, the proof was certainly not so overwhelming that the jury could reach the conclusion without accurate legal guidelines. By stressing only that a defendant need not be physically present and physically participate to be guilty as a principal and that the jury could consider "all the facts

(footnote cont'd.)

that he has knowledge of a criminal offense being perpetrated, and he seeks by his actions to make it succeed. In other words, if several persons act jointly or in concert, each performing a part that results in the commission of a crime, all are equally guilty. The essential elements of the crime charged must be proved by the Government beyond reasonably doubt. However, it is not necessary for the Government to show that a particular defendant personally committed each of the elements of the crime charged in order to find that defendant guilty. It is sufficient to find a defendant guilty if you find that the Government has proved that he was acting in concert with one or more other persons who did actually commit the crime charged in the indictments."

12/ In any event, the jury's general verdict does not reveal the theory on which it was based.

and circumstances" in determining whether he had aided and abetted, the charge constituted an open invitation to the jury to find Appellant guilty if they found any connection, no matter how slight, between him and the crime.

But §22-105 is not a catch-all statute. As is clear from the Code's distinction between accessories before and after the fact (§22-106) it does not even cover all those who participate in criminal activities, let alone those whose connection with the criminal activities does not reach the level of active and knowing participation.

In light of the tenuous case against Appellant, the trial court's failure accurately to explain to the jury what it had to find in order to convict under §22-105 constitutes prejudicial and reversible error.

III.

NUMEROUS OTHER ERRORS PREJUDICIAL TO APPELLANT TIPPED THE BALANCE IN FAVOR OF THE PROSECUTION'S SKETCHY CIRCUMSTANTIAL CASE

[With respect to this point, Appellant desires the Court to read, in addition to those pages cited under Point I, the following pages of the reporter's transcript: 20-23, 31-32, 39-40, 89, 120, 130-35, 151-52, 182, 284-88, 322-24, 331-32, 349-51.]

In addition to the erroneous instructions on aiding and abetting several other errors occurred in the course of the trial. They included:

- (a) A portion of the Court's instructions which implied that Appellant's possession of stolen property had been established;
- (b) Various prejudicial remarks and mischaracterizations of the testimony by the prosecuting attorney;
- (c) The admission of testimony that Appellant had previously visited the shop from which the property involved was taken; and
- (d) The admission, without a cautionary instruction that it could not be used against Appellant, of oral testimony concerning an alleged confession of a codefendant obtained in violation of the Mallory rule.

As we shall show, these errors were prejudicial to Appellant in that any or all of them could easily have swayed the judgment of the jury "in the total setting" of this close case. Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

A. The Trial Court's Charge on Possession of Stolen Property Misled the Jury to Believe That it Must Accept Possession As Established.

Exercising his acknowledged power to comment on the evidence, a Federal judge "may analyze and dissect the evidence, but he may not either distort it or add to it." Quercia v. United States, 289 U.S. 466, 470 (1933). Because of the great influence his "lightest word or intimation" may have on the jury, the trial judge must exercise great care that any comment on the evidence should be given "so as not to mislead." (Ibid).

Accordingly, this Court reversed a conviction under the plain error rule when the judge instructed the jury that "There is evidence in this case that certain admissions or confessions were made by the defendants" although in fact only a co-defendant and not appellant had confessed. Surratt v. United States, 269 F. 2d 240, 106 U.S. App. D.C. 49 (1959).

Similarly here, the Court instructed the jury that "In this case there has been evidence that the defendants were found in possession of property which is alleged to be stolen property." (Tr. 331). In fact, as we have shown (pp. 17-19 supra), Appellant was never seen in possession of a wig and any conclusion that he was "found in possession" of stolen property can rest only on an inference derived from the finding of the black wig near the car beside which Appellant had been standing.

Ignoring the circumstantial nature of the evidence of possession, the Court's remark on its face implied that possession had been established and that the only issue for decision was whether the property was stolen. His later general charge that the jury must "find beyond a reasonable doubt that the property in question was seen in the defendant's possession and that said property was recently stolen" (Tr. 332) was thus of little avail. Although requested to do so (Tr. 349-51), the Court refused to correct the implications of his earlier remark. Moreover, at no time did he analyze separately the widely differing evidence tending to establish "possession" as it applied to each defendant.

In sum, the charge on possession reflected not great care but rather inadvertent and misleading comment on the evidence. Since the jury was instructed it could infer Appellant's guilt from unexplained possession (Tr. 332) despite clear evidence that he was not physically present and did not physically participate in the crime, any such misleading comment was obviously prejudicial.

B. The Prosecuting Attorney's Argument to the Jury Mischaracterized the Testimony Concerning Appellant and Was Otherwise Prejudicial.

Because "the United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," our courts have long recognized that "it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). Moreover, since "the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed" any improper suggestions or arguments by the prosecutor are "apt to carry much weight against the accused when they should properly carry none." (Ibid). See also United States v. Spangelet, 258 F. 2d 338, 342 (2d Cir. 1958).

Perhaps inadvertently the prosecuting attorney here over-

stepped the bounds of fairness in an attempt to sway the jury's judgment in this close case.

Conscious of the weak case against Appellant, the prosecuting attorney devoted her entire closing argument to a review of the evidence against him. In the course of this review, she made a crucial mis-statement concerning the testimony bearing on the identification of Appellant (Tr. 287). She also implied that he had visited the Wig Shoppe in order to "look over the premises" although the testimony showed only that he had inquired about buying a wig (Tr. 285). Finally, in her closing argument, she referred to her "client" as the "District of Columbia" and "everybody" and invoked the "might and majesty of the government" (Tr. 323-24).

All of these remarks were prejudicial. The closing argument implied that the prosecutor represented not "a sovereignty whose obligation is to govern impartially," Berger v. United States, 295 U.S. 78, 88 (1935), but a "client"--indeed the members of the jury themselves--thus putting the jury in the untenable position of choosing between their own interests and those of the defendants. As for the comment on the visit to the Wig Shoppe, the inflammatory effect of the suggestion that Appellant had intended to "look over the premises" or in simpler language "case the joint" is obvious.

But the gravest error was the distortion of the identification testimony. As described by the prosecutor (Tr. 287):

"[Madell] did say there were three men; that the third man was about the same size and shape of Jackson; that the third man was wearing a dark jacket and dark pants [Traynor] testified that Jackson was wearing a dark jacket and dark pants [when arrested]." (Tr. 287; see also Tr. 322).

In fact, Madell said only that the "third man" he thought he saw was wearing "dark clothes" (Tr. 89) but did not discuss his "size and shape." On direct examination, Officer Traynor was not asked about Appellant's clothing. His statement on cross-examination by Lollar's counsel that "I believe [Appellant] was wearing the same jacket as he has on today [when arrested]" (Tr. 182) falls far short of the positive identification of jacket and pants suggested by the prosecutor. This was doubly prejudicial in face of the testimony of the government's eyewitness, Miss Flemming, that only two men were seen at the place of the crime.

The prosecutor thus violated the elementary principle "that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence." United States v. Spangelet, 258 F. 2d 338, 342 (2d Cir. 1958). Since the identification evidence concerning Appellant was tenuous at best and also contradicted by another Government eyewitness, the prosecutor's attempt to create identification by argument when she had failed to do so by evidence clearly misled the jury on this important issue.

C. The Testimony Concerning Appellant's Prior Visit to the Wig Shoppe Was Improperly Admitted.

Another link in the circumstantial case against Appellant was Shrier's testimony (Tr. 39-40) that he had visited the Wig Shoppe a few days before April 29, 1963, expressed an interest in purchasing a wig, and left after being "discouraged" from trying one on.

When the prosecutor first referred to this testimony in her opening statement (Tr. 20), the Court correctly ruled that there was "no reason" why evidence of the visit was admissible. (Tr. 21). Only after the prosecutor had represented that "two witnesses will identify the fact that three persons were present at the time of the breaking," that the "two eyewitnesses" would further testify that the "third person was wearing a dark jacket and pants" and that Appellant was "wearing a dark jacket and pants" did the Court finally change his ruling (Tr. 22-23; see also Tr. 31-32).

Not only was the ruling on admissibility of testimony concerning the visit based on an assumed connection with circumstances which were never proved, but the testimony was irrelevant in any event and highly prejudicial.

The evidence was apparently offered to show motive. But it showed at most only a general interest in wigs, scarcely enough to support an inference that Appellant would be likely to have stolen one. On the other hand, the testimony was well calculated to arouse any latent jury

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The evidence was apparently offered to show motive. But it showed at most only a general interest in wigs, scarcely enough to support an inference that Appellant would be likely to have stolen one. On the other hand, the testimony was well calculated to arouse any latent jury

prejudice against a man who would seek to try on women's wigs. Especially when embellished by the prosecutor's further suggestion that Appellant's purpose was to "look over the premises" (Tr. 285), the testimony's possible inflammatory effect far outweighs any probative value it may have had.

D. The Failure to Give a Cautionary Instruction that Dykes' Alleged Confession Could Not Be Considered Against the Codefendants Also Prejudiced Appellant.

Despite strenuous objection by Dykes' counsel on Mallory grounds (Tr. 134-35, 151), Officer Traynor was permitted to repeat an alleged oral confession by Dykes obtained after some 35 minutes of pre-arraignment questioning (Tr. 120, 130-34). According to Traynor's thrice-repeated testimony, Dykes finally admitted, "Yeah, I am the one who broke into the Wig Shoppe. I broke in and took the wigs." (Tr. 151-52). No cautionary instruction that the confession could not be considered against Appellant and Lollar was given.

Traynor's testimony was clearly hearsay and inadmissible against Appellant whether to prove the guilt of Dykes or for any other purpose. Commonwealth v. Tilley, 99 N.E. 2d 749, 754 (Mass. 1951). Without a cautionary instruction that Dykes' alleged confession was "receivable against himself only," 4 Wigmore, Evidence §1076 (1940) the jury was permitted to consider against Appellant the clearly prejudicial fact that he had been found in the company of a "confessed" participant in the crime. Cf. Edwards v. United States, 139 F.2d 365, 369, 78 U.S. App. D.C. 226, 230 (1944), cert. denied, 321 U.S. 769 (1944).

CONCLUSION

In sum, the prosecution's case against Appellant was entirely circumstantial and so speculative that it should never have been permitted to go to the jury. Instead, the jury was not only permitted to speculate but was swayed against Appellant by the erroneous aiding and abetting instruction and by the other errors detailed herein.

Clearly, the judgment of conviction should be reversed.

Respectfully submitted,

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November 7, 1963

Attorneys for Appellant
(appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 1963 a copy of the foregoing Brief for Appellant was served by United States Mail, postage prepaid, to David C. Acheson, Esq., U.S. Attorney, Room 3600a, United States Court House, Washington, D. C.

James M. Johnstone

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,099

EDMOND L. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID C. ACHESON,
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United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

- 1) Was the evidence sufficient to present a jury question of appellant's guilt of the larceny?
- 2) Was appellant denied a fair trial by the closing argument of the prosecutor; by the inclusion of evidence of his previous visit to the scene of the crime; and by receipt in evidence of the confession of a co-defendant without a limiting instruction?
- 3) Did the court properly charge the jury on aiding or abetting, and as to the proof of possession of stolen property?

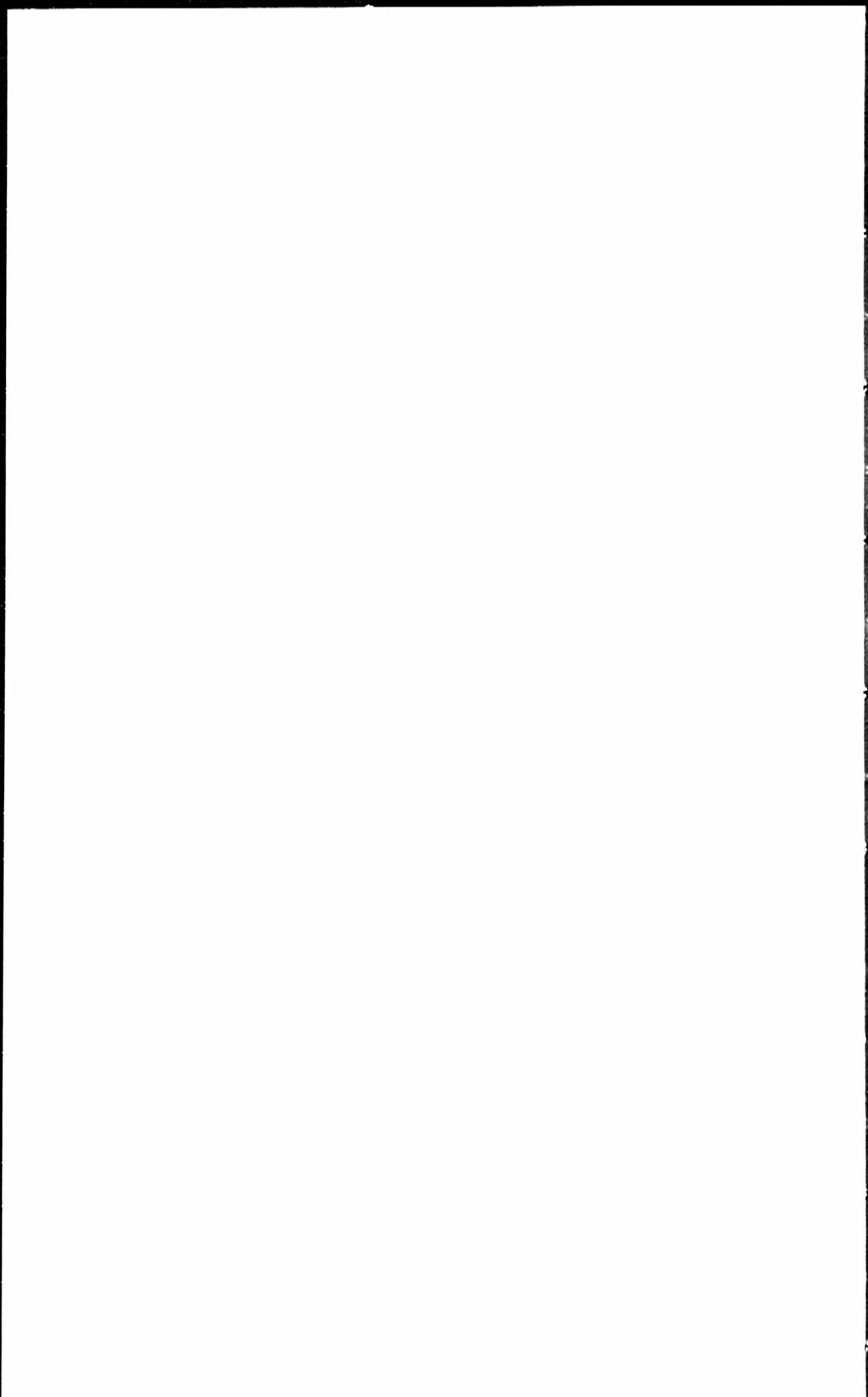
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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18099

EDMOND L. JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 20, 1963, appellant was indicted for house-breaking (22 D.C.C. 1801) and grand larceny (22 D.C.C. 2201). Trial by jury for appellant and two co-defendants, Dykes and Lollar, commenced on July 8, 1963. On July 10, 1963, the jury returned a verdict as to appellant of not guilty of the housebreaking, and guilty of the larceny. The Court on July 22, 1963 imposed a sentence of six to eighteen months.

The case revolved around the breaking of the front display window of "The Wig Shoppe" at 1762 Columbia Road, Northwest on April 29, 1963 and the taking there-

from of three ladies' wigs. The government's case consisted of two eyewitnesses to the breaking, a partner from the Wig Shoppe and two police officers. Proof for the government was as follows:

Appellant Jackson had visited the Wig Shoppe a few days prior to the theft, expressing an interest in owning a wig for an act he did as a dancer (Tr. 40). Discouraged from even trying one on, he left the shop without buying (Tr. 40). On April 29, 1963, at about midnight, three men were seen gathered in front of the Wig Shoppe window on Columbia Road (Tr. 87); on display in the window were three wigs: one black, one red and one platinum blonde (Tr. 35). After standing there a minute, one in a brown plaid jacket remained in front of the window (Tr. 87). One in dark clothes went east toward Ontario while the other, in a gray leather jacket, went west toward Champlain Street and stopped (Tr. 87-89, 96-97). The first man broke the window, removed some objects from within, ran west and, joined by the man in the grey leather jacket, rounded the corner south onto Champlain Street, giving a whistle as he went. (Tr. 87-89; 194-195, 211-212). Shortly thereafter, one witness while riding with the police saw the same three men together again walking from the scene east in the 1600 block on Euclid Street (Tr. 99, 111-112). Two calls by the police were required to stop them, another to bring them to the police car (Tr. 111-112). The three were Dykes, Lollar and appellant Jackson (Tr. 112-113).

As they approached the police car it was noted that Dykes' hand was wrapped in a red-stained white cloth; Officer Traynor saw appellant Jackson tug at the front of his sportcoat while standing behind a parked car at the exact spot where immediately thereafter the black wig from the shop was found (Tr. 113-114, 173). The three were transported to a nearby precinct in the back seat of a police car; shortly thereafter the red wig was found in the car where they had been sitting. (Tr. 187). At the precinct, Dykes was searched and the platinum blond wig

was found in the crotch of his underwear (Tr. 121, 190). Fifteen minutes following arrest (Tr. 122), Dykes stated "Yeah, I am the one who broke into the Wig Shoppe. I broke in and took the wigs." (Tr. 151).

That Dykes and Lollar were the two participants in brown and grey jackets was avouched by the witnesses Madell (Tr. 91-92) and Flemming (Tr. 194, 195). Madell first stated that he "couldn't definitely recognize" the third man (Tr. 93); on cross-examination, however, he stated that he knew the three men walking east on Euclid Street to be the three at the Wig Shoppe by their clothes and "their general shape." (Tr. 98). That appellant Jackson was wearing a dark brown sportcoat at the time of his arrest was established by Officer Traynor (Tr. 182, 112).

At the close of the government's case, appellant made motion for acquittal which was denied. Appellant offered no evidence in defense. Appellant again moved for acquittal and was denied. The jury duly returned their verdict. On July 16, 1963, appellant filed a written motion for acquittal or new trial, which was denied on July 22, 1963.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 105 provides:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

Title 22, District of Columbia Code, Section 1801, provides:

Whoever, shall, either in the night or in the day-time, break and enter, or enter without breaking, any

dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section provides:

Whoever shall feloniously take and carry away anything of value of the amount or value of \$100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

SUMMARY OF ARGUMENT

Appellant's motions for acquittal were properly denied, since there was ample evidence upon which a reasonable mind could conclude that appellant had participated in the larceny.

Appellant was not denied a fair trial by the inclusion in the case of his previous visit to the Wig Shoppe or his co-defendant's confession. The former was properly admitted to show motive and intent; the confession did not mention or implicate appellant. Nor has appellant cause to complain of the closing argument of the prosecutor, for grounds of fair comment were not overstepped, and the Government's interest in the case was not overstated.

There was no error in the court's charge to the jury. The instruction on aiding and abetting was necessitated by evidence properly in the case. It was proper and complete as given. No objection to its substance registered, the point is not preserved for review. The court's statement as to possession of stolen property was accurate as given.

ARGUMENT

I. The evidence was sufficient to submit the case to the jury. (See Tr. 33-50, 74-79, 83-85, 86-118, 120-122, 147-153, 172-173, 178-179, 182, 187, 193-195, 211-212, 215, 222, 225, 249.)

Appellant urges that a motion for a judgment of acquittal should have been granted because the evidence against him was "sketchy", warranting no more than "mere suspicion" that appellant was involved. In view of the proof which obtained against appellant at the close of the government's case, this view is clearly unsound.

It was not contested that appellant was in the wig shoppe prior to the theft, or that he evidenced more than a passing interest in ladies' wigs at that time (Tr. 39-40). It was further established that on the night of the window smashing a person having similar clothing and the same "general shape" of appellant was present, first with the other two for the minute directly in front of the shop and then as he went one direction while another of the three went the other and waited (Tr. 87). And while the witness, Madell could not "definitely" identify appellant in the courtroom, he was definite in his statement that the three defendants seen on Euclid Street were the same three he had seen at the shop on Columbia Road (Tr. 98). That appellant wore a dark brown jacket that night was uncontested (Tr. 182, 112).

Mrs. Jennings, the other eyewitness, stated she saw only two persons, but further stated her attention was not drawn to Lollar until right before the smash of the window sounded (Tr. 194). Since the gathering before the window had occurred prior to this time, and since she did not even see Dykes approach or actually break the window, her testimony does not conflict with Madell (Tr. 211, 222, 224). And as she first stated, she didn't recall if she had looked down the street toward Eighteenth Street, though she said she might have without seeing anyone (Tr. 225).

Appellant was arrested a mere few blocks from the shop (Tr. 111) having rejoined Dykes and Lollar, both identified as on the scene; Dykes as it developed confessed the theft and was in possession of one of the stolen wigs. Slow in response to the police call (Tr. 111-112), appellant stood effectively shielded by a parked car while he "tugged" the front of his coat away from his body (Tr. 113) over the very spot where seconds later another of the stolen wigs was found (Tr. 114). The third wig from the shop was found in the back of the police car where the three had ridden to the precinct (Tr. 187).

This summary of the evidence clearly reveals the presence of questions traditionally in the provence of the jury to resolve. Taking the view of the evidence most favorable to the Government, giving full play to the jury advantage to observe demeanor, evaluate gesture and draw justifiable inference of fact, a reasonable mind could well and fairly conclude appellant was guilty of the crimes. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Curley v. United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232 (1947), cert. denied, 331 U.S. 837.

The advantage enjoyed by the trial court in ruling on matters of evidence is well illustrated here in considering the manner by which the police officer portrayed appellant's shaking of his jacket front. No reporter's transcript could portray the effectiveness of the gesture; this evidence was important to the government's case against the appellant on both the theory of possession of recently stolen goods and of his aiding and abetting Dykes; that it was effective evidence is demonstrated by appellant's counsel's attempt to have the officer modify it on cross-examination (Tr. 173). This guilty possession coupled with his presence in the company of a confessed thief of the property immediately after the larceny, with the testimony that someone of his general description was on the scene are all compelling proof of commission of crime. *Edwards v. United States*, 78 U.S. App. D.C. 226, 140 F.2d 683 (1943). Alternatively, a jury might reasonably conclude appellant's guilt from the circumstance of his

standing with the others in front of the very wig shop he earlier had visited, his movement—in concert with Lollar—down the street and around the corner just prior to break-in, and his joining up with the others immediately after the crime to complete his complicity by carrying away in concealment part of the loot on his person.

In short, the foregoing evidence was more than adequate to warrant submission to the jury. The verdict duly rendered must be sustained if there is substantial evidence, taking the view most favorable to the government. *Glasser v. United States, supra*, 315 U.S. at 80; *Morton v. United States*, 79 U.S. App. D.C. 329, 147 F.2d 48 (1945), cert. denied, 324 U.S. 875. The evidence herein meets the standard of substantiality set forth in the *Glasser* decision, and the verdict of the jury must be sustained.

II. Appellant was not denied a fair trial.

(Transcript pages 18, 21-23, 26, 31-32, 36, 39-40, 74-79, 85, 89, 96, 98, 112, 113, 150-152, 182, 284-288, 300, 343-344)

Questioning the fairness of his trial, appellant brings three matters on appeal, by each of which he claims prejudice. He asserts the testimony of his initial visit to the Wig Shoppe was improper since it was of no relevance, and it inflamed and prejudiced the jury; he regards Dykes' confession, unqualified by an instruction from the court, as having been improperly considered against him; and he urges that the prosecutor's closing argument overstepped the grounds of fairness in misstating facts and mischaracterizing the Government's position in the case. Neither taken singly nor in sum do these aspects of the trial warrant reversal.

a. *Appellant's prior visit to the Wig Shoppe*

Testimony of the Wig Shoppe Manager was to the effect that appellant had visited the shop just a few days before the window SMwashing, expressing an interest in and a

desire to own a lady's wig (Tr. 40). In his appeal, appellant states the trial judge ruled the testimony admissible only after hearing what witnesses could testify of appellant's presence on the scene at the time of the larceny. Appellant renews his position that there was no evidence whatsoever that appellant was involved in the larceny.

As seen in Part I of this brief, there was ample evidence of appellant's connection with the theft. Thus evidence of an earlier visit to the shop was highly appropriate and clearly admissible. *Moore v. United States*, 150 U.S. 57, 60 (1893) (trial for murder: proof allowed that defendant was guilty of another killing). The question is whether the evidence is of a sort which bears on a possible motive for the defendant's actions, where there is other proof of those actions. *United States v. Rosenberg*, 195 F.2d 583, 595 (2d Cir. 1952) (trial for espionage: pro-Soviet statements admitted to show motive to spy for Russia). In the instant case, the court allowed the evidence because of its "character" (Tr. 32) to show that appellant "expressed an interest in the wigs" (Tr. 22). That appellant, a man, had more than a passing interest in ladies' wigs is here a strong indication of motive and intent, and is particularly apt where the theft occurred from the same store he earlier had visited.

b. Dykes' Confession

Appellant stresses that this confession was hearsay as to him, and that the Court should have instructed the jury to disregard it in considering the government's case against him. Before the confession was admitted and its content known, the court indicated he would give a limiting instruction (Tr. 85). After the statement was in the case, no objection was made by counsel and no instruction was requested.

Dykes' confession, however, implicated only himself: "Yeah, I am the one who broke into the Wig Shoppe. I broke in and took the wigs" (Tr. 151-152). There was no need for an instruction, since his co-defendants were in

no way implicated.¹ Cf. 2 Wigmore, Evidence § 1076 (1940). As to them it was admissible exactly as was the evidence of the finding of the blond wig in Dykes' underdrawers.

Appellant's trial counsel was undoubtedly aware of this. When introduction of the confession was imminent, his questions were "what is the nature of the conversation? Who is relating it? What about the other defendants?" (Tr. 85). The answers to these questions revealed in the testimony of Dykes' disclosure, no objection followed, no instruction was sought. Thus he cannot complain. Cf. *Engram v. United States*, No. 17974, decided October 17, 1963.

c. Argument of the prosecutor.

A reading of the closing argument of the prosecutor (Tr. 284-288) fails to disclose such deviation from testimony or injection of evidence peculiarly within her knowledge which led to reversal in *Berger v. United States*, 295 U.S. 78, 88 (1935), or *Stewart v. United States*, 101 U.S. App. D.C. 51, 54, 247 F.2d 42, 47 (1957). Much is made of the appellant's oft-repeated contention that no witness put him on the scene of the crime. He charges error in the prosecutor's argument that witnesses Madell and Traynor's testimony placed him at the shop (Tr. 287).

Witness Madell stated definitely that the third man at the shop wore "dark clothes", (Tr. 89, 96) though he did not characterize them as "dark jacket and pants" as the prosecutor suggested. He further stated that he recognized appellant by his "dark clothes" and "general shape" (Tr. 96, 98). He did not "discuss" his "size and shape" as the prosecutor argued, but he stated flatly that he recognized the shape, one element of which is most cer-

¹ The admission may well have inured to appellant's benefit: that Dykes took full responsibility for the window smashing probably influenced the jury to find appellant not guilty of the house breaking.

tainly size. Again, while witness Traynor was not asked about appellant's clothes on direct examination, and at no time testified appellant was in dark trousers, he had stated that appellant wore a jacket (Tr. 113). On cross-examination he opined that appellant at his arrest had worn the same coat in which he sat at trial (Tr. 182). The witness, in direct testimony identified appellant seated at the counsel table in a "dark sports coat" (Tr. 112). The Assistant United States Attorney's implication that appellant early visited the Wig Shoppe "to look it over" was hardly unwarranted on the facts.

It should be noted that the prosecutor prefaced her argument by pointing out to the jury that their recollection of the facts controlled, and that her remarks were not evidence (Tr. 284) as she had prior to opening statements (Tr. 18). The court so admonished the jury in the middle of government counsel's argument (Tr. 286), and again in its charge (Tr. 343-344). Moreover, the Judge stated in open court that counsel who felt the government misrepresented the facts should point out and correct the mistakes in their own argument. (Tr. 286). That this was not done by appellant suggests that in the context of the trial, any alleged misstatements—which he admits may have been inadvertent—were of minimal consequence.

As to the allegation of prejudice from the prosecutor's statement that the District of Columbia was her client, it is hard to imagine that in context this brief reference was unfair argument. For the Assistant United States Attorney's invocation of the "might and majesty of the Government" standing behind her in her role as prosecutor was no more a dramatization of her role in the trial than the two previous statements in identical language by appellant's counsel to the same effect, in his opening statement (Tr. 36) and closing argument (Tr. 300). Again it is significant in evaluating the impact of the prosecutor's argument that no instruction was sought to neutralize whatever effect it might have had, or preserve the point for review. *O'Malley v. United States*,

227 F.2d 332, 336 (1st Cir. 1955), *cert. denied*, 350 U.S. 966.

III. There was no error in the Court's Charge to the jury.

(See Tr. 31, 304-305, 331-332, 333-336, 344, 345.)

Appellant claims the court below erred in charging the jury on aiding and abetting. He urges that the charge as given was abstract and erroneous, and left the jury free to speculate as to appellant's guilt. And he insists that the court's charge on possession of the stolen property misled the jury.

a. *The instruction on aiding and abetting*¹

¹ In that connection you are instructed that the mere fact that a defendant is present at the scene of a crime in and of itself, and standing alone, is not sufficient in and of itself, to justify a verdict of guilty.

The presence of any defendant at the scene of a crime is a matter that may be considered in connection with all other evidence if you find that said defendant was present.

You are instructed that in arriving at your verdict you may take into account the fact that any defendant was present at the scene of the crime while it was being perpetrated, if you so find, and in that event you may also take into account all the facts and circumstances surrounding and affecting any defendant's presence there, as you may determine those facts and circumstance to be established beyond a reasonable doubt in reaching a conclusion as to whether such defendant was or was not guilty of the crime of grand larceny.

In this connection you are instructed that it is not necessary that a person be physically present and physically participate in the commission of an offense in order to be guilty of an offense as a principal.

You are instructed that it is the law in the District of Columbia that in prosecutions for any criminal offense, all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offenders, shall be charged as principals and not as accessories. The authority for that is Title 22, District of Columbia Code, Section 105.

To aid and abet is meant to assent to an act, to lend to it countenance and approval, either by an active participation in it or by in some manner advising, inducing, or encouraging it.

In this case if you find that the government has shown beyond

In his brief appellant takes the position that there was no evidence that appellant participated in the crime in any way. As seen in section I of this brief, there was adequate evidence implicating appellant which necessitated instruction on aiding and abetting. His presence and actions on the scene immediately prior to the crime manifested a clear need for the instruction.

As to the content of the charge, appellant contends the charge failed to emphasize the necessary elements of aiding and abetting as applicable to the facts of the case.

It is axiomatic that a charge to a jury must be considered as a whole. *Kinard v. United States*. 69 U.S. App.

a reasonable doubt that the offenses charged in the indictment or one of them have been committed, and that it has also been shown beyond a reasonable doubt that any of the defendants, even though not physically participating in it, aided and abetted in the commission of said offense, this will be sufficient to justify you in finding such defendant guilty of the said offense.

Therefore, where one or two defendants are found guilty as principal offenders, and the other has having aided and abetted said principal offender or offenders, the defendant who aided and abetted is guilty of the same offense as though he were the principal offender.

Of course, where the jury is not convinced beyond a reasonable doubt that the offense charged in the indictment were in fact committed, or it is not convinced beyond a reasonable doubt that the defendant charged as aider and abettor did in fact aid and abet in the commission of the offense charged in the indictment, then the jury must return a verdict of not guilty as to the defendant or defendants charged with aiding and abetting.

In this connection you, the jury, are to consider all the facts and circumstances in connection with and surrounding the alleged acts of any defendant as elements to be taken into account by you in determining whether or not it has been established beyond a reasonable doubt that any defendant in this case aided or abetted the principal offender in the commission of any alleged offense charged in this case, if you shall have found a principal offender or offenders did commit said alleged offense.

The burden of proof is on the government to prove the defendants guilty beyond a reasonable doubt. Unless the government sustains this burden and proves beyond a reasonable doubt that the defendants have committed every element of the offenses with which they are charged, you, the jury, must find them not guilty of said offense.

D.C. 322, 101 F.2d 246 (1938). The duty of the court in instructing a jury is to state correctly the law applicable to the particular situation before it. *Graham v. United States*, 88 U.S. App. D.C. 129, 187 F.2d 87 (1950). Except for essential principles of law, the trial judge has no duty to instruct in the absence of proper request. *George v. United States*, 75 U.S. App. D.C. 197, 125 F.2d 559 (1942). And as a general rule, where the law governing the case is expressed in statute, the language of the statute should be used in the charge. *Maynard v. United States*, 94 U.S. App. D.C. 347, 215 F.2d 336 (1954).

Here, the court's charge followed exactly the words of 22 D.C. Code § 105. The court further defined the words "aid and abet", though in themselves they are not limited as words of art peculiar to the law and legal proceedings. Their meaning is clear in the body of the charge as explained by the court, a charge which clearly set forth the principles of law applicable to the situation.

It appears in the record that prior to the delivery of the charge, appellant's counsel was concerned with how the instruction was to be given (Tr. 280). The court indicated he had received no proffers, as requested at the very start of trial (Tr. 31), and indicated his intention to give his own instruction. There was no suggestion by appellant's counsel at this time as to the content of the charge. At the conclusion of the instructions, counsel again objected to the giving, but not the content, of the charge. Even had counsel objected to the substance of the charge it is doubtful that this Court could hold it error. Here, his absence of objection suggests that he acquiesced in its content, since he had—prior to its delivery—suggested caution in how it was to be given, and since his closing argument to the jury did not say there was *no* evidence in the case as to appellant's presence on the scene, but rather that the witness Madell had imagined rather than seen the third person in front of the shop. (Tr. 304-305).

b. *The charge as to possession of stolen property.*

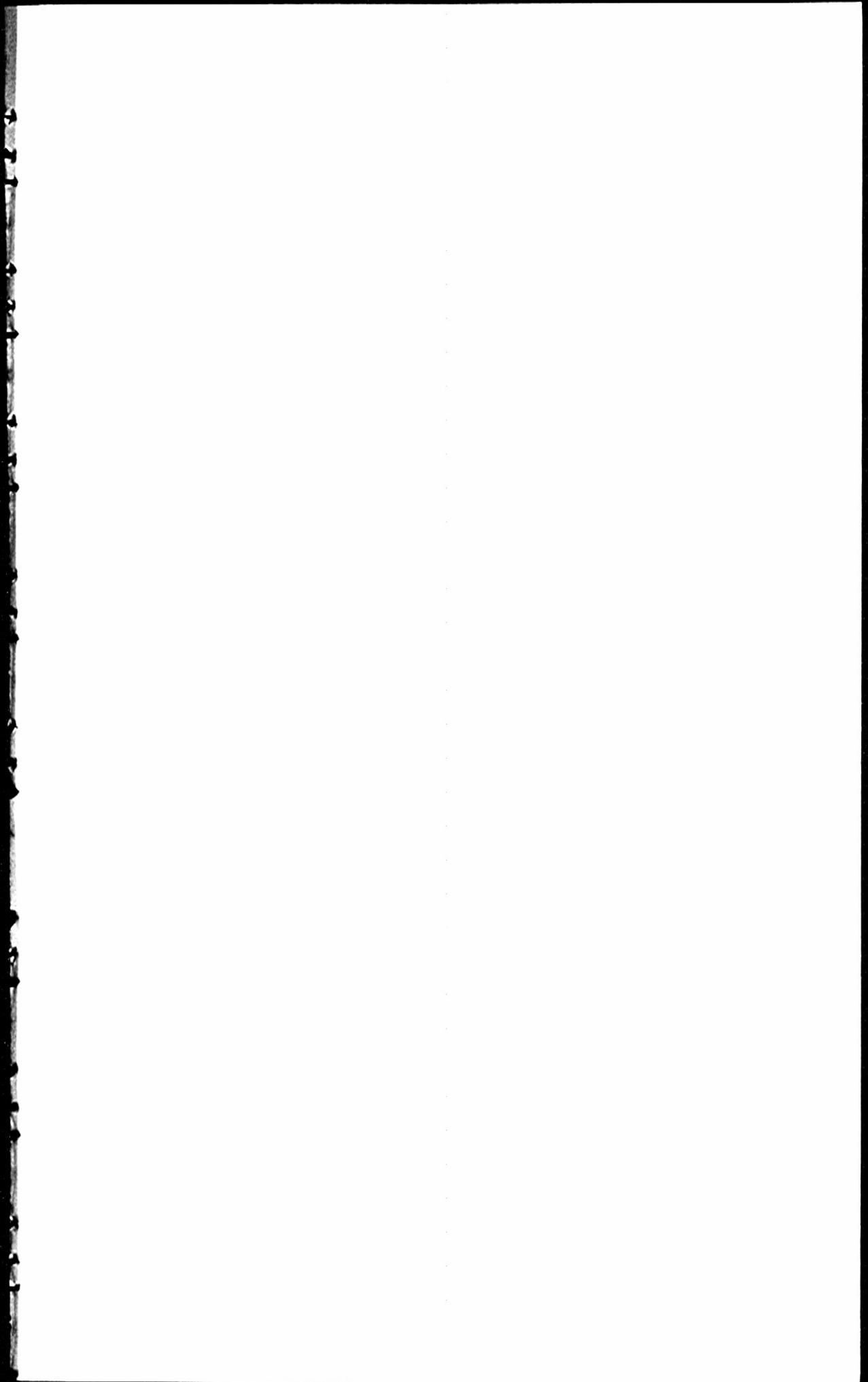
Appellant reads as misleading the court's pronouncement "In this case there is evidence the defendants were found in possession of property which is alleged to be stolen property" (Tr. 331). He contends that these words indicated to the jury that possession of the wigs had been established rather than remaining a matter open for their decision. This argument overlooks the plain meaning of the words of the charge and ignores the mandate of *Kinard v. United States, supra*, that the charge must be read as a whole. He admits an inference of possession is generated by the finding of the black wig where appellant had been standing (Appellant's brief p. 3,); this is certainly evidence of possession, the more-so in the light of the circumstances of the finding of the other two wigs. Had the court stated "There is *conclusive* evidence of possession", appellant's argument might avail. The above statement of the court when coupled with his later admonition that the jury could "only" rely on the inference from possession if "the property in question was *seen* in the defendant's possession . . ." (Tr. 332, emphasis supplied) was a proper statement of the circumstances. If anything, the instruction was overly generous to the defense. It is hardly firm ground for complaint.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court must be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,099

EDMUND L. JACKSON,

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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* Cases principally relied on are marked with asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR APPELLANT

Preliminary Statement

Largely ignoring the facts in favor of abstract statements of general principles, the prosecution's brief fails to discuss or distinguish a single one of Appellant's principal authorities and thus singularly fails to come to grips with the issues in this case.

Most fundamentally (1) despite distortion of the evidence and emphasis on irrelevant testimony, the prosecution has failed to show how its case against Appellant can support the jury's verdict under applicable standards of proof.

The prosecution's further unsupported assertions (Br. 11-13)^{1/} that the "aiding and abetting" instruction was correctly given

1/ "Br." refers to the prosecution's brief, filed January 20, 1964.
"App. Br." refers to Appellant's main brief, filed November 7, 1963.
Unless otherwise indicated, emphasis has been supplied.

and that Appellant is foreclosed from objecting to the instruction on appeal by reason of alleged technical deficiencies in the objections made by Appellant's counsel at trial is likewise without merit. To the contrary, as we shall show (2) the charge on "aiding and abetting" was clearly erroneous; Appellant's objections were properly preserved for appeal; and in any event, in light of the flimsy and tenuous nature of the prosecution's case against appellant, the error in the crucial instruction on aiding and abetting constitutes plain error affecting substantial rights, requiring ^{2 /} correction by this Court even in the absence of objection below. 2 /

2 / By confining this brief to the points specifically mentioned above, Appellant does not concede the merits of the prosecution's remaining arguments. In particular, the prosecution's contentions (Br. 7-11) that the various errors complained of in Part III of Appellant's main brief did not deprive him of a fair trial lose sight of the fundamental principle that in a close case such as this one, "error which under some circumstances would not be ground for reversal cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." Glasser v. United States, 315 U.S. 60, 67 (1942). Viewed in this light, the various errors assigned by appellant, especially the admitted misstatements of fact in the prosecutor's argument (Br. 9-10), constitute prejudicial error.

Argument

I

Despite Distortion of the Evidence and Emphasis on Irrelevant Testimony, the Prosecution Has Failed to Show How Its Case Against Appellant Can Support the Jury's Verdict Under Applicable Standards of Proof.

Based primarily on abstract principles drawn largely from inapposite cases, the prosecution's contention (Br. 5-7) that "The evidence was sufficient to submit the case to the jury" contradicts both the facts of this case and the relevant precedents of this Court.

With respect to the standard to be applied in ruling on an appeal from the denial of a motion for acquittal, the prosecution cites no case post-dating the important Cooper and Scott cases relied on by appellant. Cooper v. United States, 94 U.S. App. D.C. 343, 218 F. 2d 39 (1954); Scott v. United States, 98 U.S. App. D.C. 105, 232 F. 2d 363 (1956). Nor does the prosecution even suggest how affirmance here could be squared with this Court's reversal of the jury's verdict in Scott, where the case against the Appellant was much stronger than here (See App. Br. 23).

Stripped of its inaccuracies and irrelevancies,^{3/} the prosecution's case against Appellant rests solely on the inferences to be drawn

3 / Contrary to the prosecution's assertions, Madell never testified that he was sure that all three defendants seen on Euclid Street were the same three he thought he had seen on Columbia Road. His testimony is clear that he could not pick out any particular defendant by

(footnote con't)

from the facts that he was found with Lollar and Dykes,^{4/} some time after the breaking, and that a black wig was later found beside the car where he was standing when arrested.^{5/}

But mere association with a guilty party either before or after the crime cannot in itself establish guilt. See Scott v. United States, 98 U.S. App. D.C. 105, 232 F.2d 362 (1956); Davis v. United States, 107 U.S. App. D.C. 76, 79, 274 F.2d 585, 588 (1960). And, in sharp contrast to Edwards v. United States, 78 U.S. App. D.C. 226, 229, 139 F.2d 365, 368 (1944) cert. den. 321 U.S. 769 (1944), the evidence here fails to establish that any third person was involved in the crime in any way. Moreover, also unlike Edwards

3 / (footnote con't)

his "general shape" and in fact, even with respect to Dykes, whose plaid jacket first drew Madell's attention to the group on Euclid Street (Tr. 88, 99), "if you take the jacket out I do not think I could positively identify him." (Tr. 100). Miss Flemming's failure to recall if she had looked toward 18th Street (Br. p. 5) is irrelevant to the case against Appellant, since according to Madell, the unidentified "third man" allegedly went around the corner on Ontario (Tr. 87, 89, 93, 96), the very direction Miss Flemming was looking prior to the breaking. (Tr. 224-225).

4 / Lollar and Dykes, whose cases were originally consolidated with Appellant's, have abandoned their appeals.

5 / Since no one ever identified Appellant as the "third man" Madell thought he saw in front of the Wig Shoppe and since Miss Flemming's testimony clearly indicates she would have seen a third man had one actually been present (Tr. 240-241), the prosecution's further argument that the jury could infer guilt from the circumstance of Appellant's standing before the Wig Shoppe (Br. 6-7) is simply unsupported by the facts. Moreover, the prosecution does not even suggest how

(footnote con't)

where the defendant was found wearing a stolen suit, the evidence of Appellant's "possession" of stolen property in this case is itself based on an inference derived from the finding of the wig beside the car. In short, the case against Appellant was totally lacking in probative evidence establishing his knowing and active participation in a common criminal plan with Dykes and Lollar, United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) and other authorities cited in App. Br. 21-22, let alone his physical participation in the crime. Even on appeal, the prosecution has not suggested how Appellant's activities--either those proved or those based on conjecture--were supposed to aid Lollar and Dykes in stealing the wigs. In arguing that the case was properly permitted to go to the jury, the prosecution would substitute speculation based on an inference that stolen property was in Appellant's possession for the proof beyond a reasonable doubt required by traditional principles of criminal justice.^{6 /}

5 / (footnote con't)

this circumstance--standing in front of the Wig Shoppe and then simply walking away from the other defendants--could possibly support an inference of guilt. See Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952) (aiding and abetting conviction requires evidence of "conduct of an affirmative nature" occurring "before or at" the time of the crime).

6 / Elsewhere in its brief (p. 14), the prosecution apparently concedes that it cannot rely on the inference from possession in the case against Appellant. For it characterizes as a "proper statement of the circumstances" necessary to correct the trial court's misleading comment on the evidence of possession (See App. Br. 30-32) the further instruction (footnote con't)

II

The Charge on "Aiding and Abetting" Was Clearly Erroneous; Appellant's Objections Were Properly Preserved for Appeal; and In Any Event, In Light of the Flimsy and Tenuous Nature of the Prosecution's Case Against Appellant, the Error in the Crucial Instruction on Aiding and Abetting Constitutes Plain Error Affecting Substantial Rights Requiring Correction By This Court Even in the Absence of Objection Below.

Although the prosecution states (Br. 13) that "the duty of the Court in instructing a jury is to state correctly the law applicable to the particular situation before it," its brief fails to cite or discuss a single authority defining "aiding and abetting" let alone approving an instruction such as the one given here. This omission is particularly glaring in light of the numerous authorities from this and other jurisdictions (collected in App. Lr. 21-22, 27-28) establishing that "aiding and abetting" encompasses only "purposive" and active participation in a common criminal plan.

Contradicted by this body of authority, the prosecution's bald assertion (Br. 13) that the words "aid and abet" "are not limited as words of art peculiar to the law and legal proceedings" so that the mere reading of the statute to the jury (22 D.C. Code § 105) was a sufficient instruction is manifestly incorrect. For if this were true,

6 / (footnote con't)

that the inference applied "'only' . . . if 'the property in question was seen in the defendant's possession. . . .'" (Ibid., emphasis in original).

the lay jury's understanding of the term "aiding and abetting" as broader than the law contemplates could not have provoked the numerous reversals cited in Appellant's brief. See especially Scott v. United States, 98 U.S. App. D.C. 105, 232 F.2d 362 (1956); Johnson v. United States, 195 F.2d 673 (8th Cir. 1952); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).

Moreover, the instruction in this case did not stop with the words of the statute but purported to further define the phrase "aiding and abetting". In so doing, the instruction ignored the traditional requirements of "shared criminal intent," and "conduct of an affirmative nature," Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952), and instead told the jury that aiding and abetting constituted merely "assent to an act . . . either by an active participation in it or by in some manner advising, inducing or encouraging it." (Tr. 334). This incorrect definition of "aiding and abetting" was aggravated by the trial court's repeated emphasis on the fact that the defendant need not be "physically present" or "physically participate" in the offenses charged to be found guilty as a principal. (Tr. 334-335).

Taken as a whole, the charge on "aiding and abetting" simply told the jury that they were free to convict if they found any connection, no matter how slight, between Appellant and the crime. Unless the "aiding and abetting" statute is to be transformed into an all-

encompassing prosecutor's dragnet, no such interpretation should be tolerated.

Unable to defend the instruction on its merits, the prosecution (Br. 13) retreats to the highly technical contention that Appellant is precluded from objecting to the content of the charge because his counsel failed to make detailed objections at the time of the trial.

Significantly, the prosecution cites no authority in support of this contention. Rule 30 of the Federal Rules of Criminal Procedure provides that

"no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection."

At the conclusion of the Judge's charge in this case, Appellant's trial counsel stated:

"I take exception on behalf of Jackson to your instruction on advising, conniving and abetting. There was nothing in the testimony that alleged that is what their connection was; that they aided and abetted and assisted. They were directly charged with being principals, not accessories." (Tr. 351)

Thus, far from "acquiescing" in the charge, Appellant's trial counsel clearly objected to its having been given at all, on the grounds that the evidence did not support an "aiding and abetting"

charge against Jackson. ^{7/} The prosecution's present position appears to be that since counsel was further required to make detailed objections to the content of the charge in order to preserve an objection thereto on appeal. But his objection to any charge on "aiding and abetting" being given at all obviously encompassed an objection to the misleading and erroneous charge which was given.

Moreover, any further detailed objection would have been fruitless. Immediately after Appellant's counsel made his objection, counsel for defendant Lollar requested a more detailed explanation of "aiding and abetting," which was summarily refused. (Tr. 352). ^{8/} See United States v. Lefkowitz, 284 F.2d 310, 313 n. 1 (2d Cir. 1960).

7/ This position is supported by Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952) requiring "participation in the criminal act in furtherance of the common design either before or at the time the criminal act is committed." The prosecution's agreement with this standard is implicit in the contention (Br. 12) that Appellant's "presence and actions on the scene immediately prior to the crime" justified the instruction. But, as detailed above (p. 4, n. 5) Appellant's "presence" on the scene was never established and the "actions" of the "third man" scarcely warrant suspicion.

8/ MR. JOHNSON: "We would renew at this time the substance of the second of our written requests which in effect requests that the Court instruct that the fact of presence at the scene of the alleged crime, taken with the fact no effort was made to prevent the crime by any defendant, would be insufficient to constitute aiding and abetting." (Tr. 352)

(footnote con't)

Jackson's and Lollar's objections called the attention of the trial judge to the "aiding and abetting" instruction and gave him ample opportunity to correct it, thus fulfilling the purpose of Rule 30. United States v. Currens, 290 F.2d 751, 758-759 (1961). The technical refinements on Rule 30 now proposed by the prosecution would cast an unnecessary burden upon trial counsel and, more important, severely prejudice Appellant because of the crucial importance of the "aiding and abetting" instruction to his case. 9 /

Thus, even assuming, arguendo, that Appellant's and Lollar's objections to the content of the charge in the trial court were technically insufficient, the plain error rule (Fed. R. Crim.

8 / (footnote con't)

This objection obviously called into question the court's instructions that "to aid and abet is meant to assent to an act . . . by in some manner advising, inducing or encouraging it" (Tr. 335) and that the jury could consider "all the facts and circumstances" in determining whether any defendant had aided or abetted the principal offender. (Tr. 335).

9 / The prosecution's contention that Appellant's trial counsel was required to make a detailed alternative objection to the content of the aiding and abetting charge, in addition to objecting to the charge as a whole, contrasts sharply with the suggestion (Br. 10) that the admitted misstatements of fact in the prosecutor's argument "in the context of the trial . . . were of minimal consequence." Apparently, the prosecution advocates a dual standard for the conduct of trials, with only defendants' counsel held to a standard of perfection.

Proc. 52(b)) requires that the error in the instruction be noticed and corrected by this Court.

As pointed out in Appellant's main brief (pp. 28-29), the aiding and abetting charge undoubtedly played a crucial part in his conviction. Appellant was not "physically present" and did not "physically participate" in the offenses charged. When the Judge twice emphasized that a defendant need not be "physically present" and "physically participate" in order to be convicted as a principal under the aiding and abetting theory, the jury undoubtedly connected the aiding and abetting instruction with the case against Appellant. In light of the prosecution's continuing failure even to advance a tenable theory as to how the actions of the unidentified and possibly non-existent third man were supposed to be knowingly calculated to make a joint criminal venture succeed, it appears more than likely that the jury would not have convicted if they had been given a proper instruction stressing the traditional elements of knowing and active participation in a common criminal plan. ^{10/} For in a close case, error which might not be prejudicial in a different context is much more likely "to have provided the slight impetus which swung the scales toward guilt." Glazier v.

10/ Compare instruction on aiding and abetting in United States v. Turberville, Cr. No. 14-60, Tr. Vol. 5, pp. 511-12 (D.C. 1960) set out in App. Br. 27-28, n. 11.

United States, 315 U.S. 60, 67 (1941); see also Kotteakos v.

United States, 328 U.S. 750, 764-765 (1946).

Especially in light of the flimsy and tenuous evidence against Appellant, this case requires the court to exercise its inherent power to inquire into the adequacy of the charge, regardless of the technical qualifications of the objections below. Smith v.

United States, 230 F.2d 935, 939 (6th Cir. 1956); cf. Brotherhood of Carpenters v. United States, 330 U.S. 395, 411-12 (1947).

Conclusion

As detailed herein and in Appellant's main brief, the case against Appellant was so speculative that the conviction should be reversed and a judgment of acquittal entered. In the alternative, the erroneous aiding and abetting instruction, as well as other errors discussed herein and in Appellant's main brief, require at a minimum that the case be remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 1964, a copy of the foregoing Reply Brief for Appellant was hand delivered to the office of Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Courthouse, Washington, D.C.

James M. Johnstone